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Mark K. Dickson

In re application of: Keith G. Lintott

Appl. No.: 10/693,364

Filed: October 24, 2003

For: Chrysanthemum Plant Named
'Nighthawk Yellow'

Art Unit: 1661

PTO Confirmation No.: 3128

Examiner: June Hwu

Atty. Docket: 10451.0054.NPUS01

INFORMATION DISCLOSURE STATEMENT

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Listed on accompanying PTO Form 1449 are documents and other information that may be considered material to the examination of this application, in compliance with the duty of disclosure requirements of 37 C.F.R. §§ 1.56, 1.97 and 1.98. Copies of the documents are enclosed.

Enclosed is a copy of U.S. Plant Patent No. 11,606 entitled "Chrysanthemum Plant Named Gold Crest." The variety 'Gold Crest' is discussed in the Brief Summary of the Invention in the instant application.

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Also enclosed is a copy of a Royal Van Zanten Garden Mum 2002 Catalog ("the Garden Mum Catalog") listing a brief description of the Chrysanthemum variety 'Nighthawk' at pages 9 and 14 and a color picture at page 6. The unpatented variety 'Nighthawk' is the parent of the variety 'Nighthawk Yellow' that is the subject of this application and is discussed in the Brief Summary of the Invention in the instant application. Also briefly described in the Garden Mum Catalog at pages 9 and 14, is a variety named 'Nighthawk lemon,' which is the same variety that is the subject of this application. 'Nighthawk lemon' was the commercial denomination initially chosen for the variety that is the subject of this application. The variety name has been changed to 'Nighthawk Yellow' but that change is not reflected in the catalog listing. A color picture of the 'Nighthawk lemon'/'Nighthawk Yellow' variety is shown at page 6 of the catalog.

Further enclosed is a declaration by Mr. Peter Hesse relating to the Garden Mum Catalog. A copy of the catalog is attached to the declaration as Exhibit A. As explained in the declaration of Mr. Hesse, the Garden Mum catalog was not publicly available more than one year prior to the filing date of the instant application. Although the Applicant does not believe that the Garden Mum Catalog is effective prior art as to its disclosure of the variety 'Nighthawk lemon,' the circumstances of the public distribution of the catalog are disclosed here for the Examiner's review and consideration.

As seen from the declaration, Mr. Hesse is the former Marketing Manager of Royal Van Zanten LLC, Nipomo, California, which issued the Garden Mum Catalog. From July 1, 2000, until the spring of 2004, Royal Van Zanten produced and sold Chrysanthemum cuttings for pots, cut flowers and gardens. During that time, Royal Van Zanten was the exclusive distributor of Chrysanthemum varieties developed at Cleangro, Ltd., Chichester, West

Sussex, United Kingdom. 'Nighthawk Yellow', the variety that is the subject of the instant application, was developed at Cleangro Ltd.

As set forth in Mr. Hesse's declaration, Royal Van Zanten sold its varieties to a select few customers directly or through Cleangro Ltd's exclusive sales representative, Ball Seed Company, Chicago Illinois. Royal Van Zanten advertised the Chrysanthemum varieties by catalogs, including the Garden Mum Catalog.

According to Mr. Hesse's declaration, the Garden Mum Catalog was printed and delivered to Royal Van Zanten on or about October 12, 2001. Copies of the Garden Mum Catalog were given to sales representatives of Ball Seed at a conference in Chicago on or about Wednesday, October 17, 2001. A draft mailing list for distribution of the catalog by Royal Van Zanten to potential customers was first created at Ball Seed as a spreadsheet on Friday, October 22, 2001. A letter to be inserted into the catalog for distribution was created at Ball Seed as a Microsoft Word document on Monday, October 22, 2001. A copy of the draft letter is attached to Mr. Hesse's declaration as Exhibit B.

From the series of events described by Mr. Hesse, it appears that the catalog was not ready for distribution to potential customers prior to at least Tuesday October 23, 2001, following the preparation of the letter insert. Further, the catalogs did not include pricing information. It would have been necessary for customers to contact Ball Seed, the sales representative, or, in the case of a few select customers, Royal Van Zanten, to obtain pricing information for the varieties listed in the Garden Mum Catalog.

According to Mr. Hesse's declaration, Royal Van Zanten typically distributed catalogs such as the Garden Mum Catalog through bulk mail at the Standard Mail rate of the United States Post Office. The Post Office advertises on its website that the delivery time for Standard Mail shipping for catalogs of the size and weight of the Garden Mum Catalog is at

least 2-9 days for locations throughout the United States. As noted in Mr. Hesse's declaration, the Post office confirmed that this delivery rate would have applied in 2001 also, when the catalog was actually distributed.

Based upon the information contained in the declaration of Mr. Hesse, Applicant does not believe that the Garden Mum Catalog was available more than one year prior to the effective filing date of the instant application for the variety 'Nighthawk Yellow.' The instant application was filed on October 24, 2003, claiming priority to provisional application Serial No. 60/421,384, originally filed on October 25, 2002. Potential customers of Royal Van Zanten or Ball Seed would not have received the Garden Mum Catalog for at least two days after its mailing or until October 25, 2001 at the earliest, which is not more than one year prior to the effective U.S. filing date for this application. Moreover, inasmuch as the catalog did not include pricing information, it does not appear to have constituted an offer to sell the varieties listed there but rather only an advertisement of them, again not more than a year prior to the effective date for this application.

To the Applicant's knowledge, the instant plant variety, 'Nighthawk Yellow,' has not been sold, offered for sale, or otherwise made publicly available in the United States or elsewhere more than one year prior to the effective U.S. application filing date. Moreover, the instant variety has not been the subject of an application for protection in any other country, or appeared in any other printed publication, more than one year prior to the U.S. filing date for this application.

Applicant reserves the right to establish the patentability of the claimed invention over any of the information provided here, and/or to prove that this information may not be prior art, and/or to prove that this information may not be enabling for the teachings purportedly offered.

This statement should not be construed as a representation that a search has been made, or that information more material to the examination of the present patent application does not exist. The Examiner is specifically requested not to rely solely on the material submitted herewith.

It is respectfully requested that the Examiner initial and return a copy of the enclosed PTO-1449, and to indicate in the official file wrapper of this patent application that the documents have been considered.

It is believed that this disclosure complies with the requirements of 37 C.F.R. §§ 1.56, 1.97 and 1.98, and the Manual of Patent Examining Procedures § 609. If for some reason the Examiner considers otherwise, or requires additional information, Applicant requests that the Examiner call the undersigned so that any deficiencies can be remedied.

The U.S. Patent and Trademark Office is hereby authorized to charge any fee deficiency, or credit any overpayment, to Deposit Account No. 08-3038 referencing docket number 10451.0054.NPUS01.

Dated: July 1, 2004

Respectfully submitted,



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LIST OF REFERENCES CITED BY APPLICANT <i>(Use several sheets if necessary)</i> PTO FORM 1449	ATTY. DOCKET NO.	APPLICATION NO.
	*10451.0054.NPUS01	*10/693,364
	APPLICANT	
	*Keith G. Lintott	
	FILING DATE	GROUP
	*October 24, 2003	*1661

U.S. PATENT DOCUMENTS								
*EXAMINER INITIAL		DOCUMENT NUMBER	DATE	NAME	CLASS	SUBCLASS	FILING DATE IF APPROPRIATE	
	1.	Plant 11,606	10/31/00	Boeder	Plt./289		10/6/98	
	2.							
	3.							
	4.							
FOREIGN PATENT DOCUMENTS								
*EXAMINER INITIAL		DOCUMENT NUMBER	DATE	COUNTRY	CLASS	SUBCLASS	TRANSLATION	
							YES	NO
	5.							
	6.							
	7.							
OTHER REFERENCES (Including Author, Title, Date, Pertinent Pages, Etc.)								
	8.	Royal Van Zanten Garden Mum Catalog 2002, listing Chrysanthemum variety 'Nighthawk lemon' and Nighthawk at pages 6 (color pictures), 9 and 14.						
	9.							
	10.							
	11.							
	12.							
	13.							
	14.							
	15.							
	16.							

*EXAMINER: Initial if reference considered, whether or not citation is in conformance with MPEP 609; Draw line through citation if not in conformance and not considered. Include copy of this form with next communication to applicant.